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Attorney for Plaintiff, JAMES M. KINDER, an individual

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,)
)
Plaintiff,)
)
v.)
)
HARRAH'S ENTERTAINMENT, Inc.;)
HARRAH'S OPERATING COMPANY,)
Inc.; HARRAH'S MARKETING)
SERVICES CORPORATION; HARRAH'S)
LICENSE COMPANY, LLC; HARRAH'S)
LAUGHLIN, Inc.; HBR REALTY)
COMPANY, Inc. and DOES 1 through 100,)
inclusive,)
)
Defendants.)

Case No. 07 CV 2132 DMS (AJB)
[Consolidated with 07CV2226 DMS (AJB)]

Judge: Hon. Dana M. Sabraw
Mag. Judge: Hon. Anthony J. Battaglia

**POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S MOTION
TO STRIKE EVIDENCE SUBMITTED
BY DEFENDANTS IN SUPPORT OF
THEIR REPLY RESPONSE TO
PLAINTIFF'S OPPOSITION TO
MOTION FOR SECURITY**

Date: April 25, 2008
Time: 1:30 p.m.
Courtroom: 10

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1 **1. Declaration of Michael E. Kostrinsky, in its entirety (Exhibit A):**

2 Defendants have requested judicial notice of a declaration by Michael E. Kostrinsky.

3 **Grounds for objection:**

4 This document should be stricken because it is hearsay, irrelevant, lacking in foundation
5 and has not been authenticated. Furthermore, as the “facts” therein are not properly subject to
6 judicial notice, this document is not good evidence and should be stricken. While the existence
7 of a document in a court file may be judicially noticed, the truth of matters asserted in such
8 documents is not subject to judicial notice. *Sosinsky v. Grant*, (1992) 6 Cal.App.4th 1548. “A
9 court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part of a
10 court record or file.” *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [Emphasis in original].
11 The court may take judicial notice of the existence of other court records and files, but cannot
12 accept findings of fact contained in those files as true. *See The Rutter Group, Civil Procedure*
13 *Before Trial § 7:12-7:15.10*. Furthermore, this evidence was submitted after Plaintiff filed his
14 opposition to Defendants’ motion and therefore constitutes an improper newly submitted matter,
15 which should have been offered with Defendants’ original moving papers, if at all.

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19 **2. Order from the Court of Appeal, Fourth Appellate District Division One, State of**
20 **California, Case No. D004862. The People v. James Michael Kinder, Dated**
21 **September 1, 1987 (Exhibit B):**

22 **Grounds For Objection:**

23 This exhibit is inadmissible in its entirety pursuant to California Evid. Code § 788, in that
24 Plaintiff was granted a dismissal in the case which was the subject of the appeal in Case No.
25 D004862, pursuant to Penal Code § 1203.4. Moreover, this evidence is irrelevant, without
26 foundation, has not been authenticated and is hearsay. Finally, this evidence was submitted after

Plaintiff filed his opposition to Defendants' motion and therefore constitutes an improper newly submitted matter, which should have been offered with Defendants' original moving papers, if at all. Furthermore, as the "facts" therein are not properly subject to judicial notice, this document is not good evidence and should be stricken. While the existence of a document in a court file may be judicially noticed, the truth of matters asserted in such documents is not subject to judicial notice. Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548. "A court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part of a court record or file." Bach v. McNelis (1989) 207 Cal.App.3d 852, 865 [Emphasis in original.]. The court may take judicial notice of the existence of other court records and files, but cannot accept findings of fact contained in those files as true. See The Rutter Group, Civil Procedure Before Trial § 7:12-7:15.10.

3. *Loshonkohl v. Kinder*, 109 Cal.App.4th 510 (2003) (Exhibit C):

Grounds For Objection:

Defendants have not laid a proper foundation for this evidence nor has this evidence been authenticated. This evidence is irrelevant hearsay and was submitted after Plaintiff filed his opposition to Defendants' motion and therefore constitutes an improper newly submitted matter, which should have been offered with Defendants' original moving papers, if at all. Furthermore, as the "facts" therein are not properly subject to judicial notice, this document is not good evidence and should be stricken. While the existence of a document in a court file may be judicially noticed, the truth of matters asserted in such documents is not subject to judicial notice. Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548. "A court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part of a court record or file." Bach v. McNelis (1989)

207 Cal.App.3d 852, 865 [Emphasis in original.]. The court may take judicial notice of the existence of other court records and files, but cannot accept findings of fact contained in those files as true. *See The Rutter Group, Civil Procedure Before Trial* § 7:12-7:15.10.

4. Declaration of Ronald R. Giusso, in its entirety:

Defendants have filed a Declaration by Ronald R. Giusso dated April 18, 2008.

Grounds for objection:

Mr. Giusso's declaration does not state that the matters attested to therein are based upon Mr. Giusso's personal knowledge, let alone lay any proper foundation for any personal knowledge upon which he makes his declaration. Mr. Giusso merely states that "I could and would competently testify to all facts within my personal knowledge except where stated on information and belief." (§ 1) This is insufficient for the court to conclude that all of the matters stated in Mr. Giusso's declaration are based upon personal knowledge. In fact, it appears that Mr. Giusso is attempting to state that he would be willing to testify to those facts that *are* within his personal knowledge, but does not say which matters stated in the declaration are actually within his personal knowledge. Finally, this new evidence was submitted after Plaintiff filed his opposition to Defendants' motion and therefore constitutes an improper newly submitted matter, which should have been offered with Defendants' original moving papers, if at all. Therefore, the entirety of Mr. Giusso's declaration should be stricken.

5. Declaration of Ronald R. Giusso, Paragraph 3:

Paragraph 3 of the Declaration of Ronald R. Giusso states:

"KINDER's profession is the filing of lawsuits based on his (619) 999-9999 pager number. A review of the numerous lawsuits filed by KINDER discussed in this

1 motion reveals not a single case was tried on the merits in San Diego County.”

2 **Grounds For Objection:**

3 Each and every factual statement in this paragraph lacks foundation and therefore this
4 paragraph should be stricken in its entirety. Moreover, Mr. Giusso’s comments here state
5 misleading and inaccurate legal conclusions [“not a single case was tried on the merits”] and
6 offer inappropriate non-expert “opinion” testimony about the nature of Plaintiff’s previous
7 lawsuits and Defendants’ allegation that Plaintiff’s “profession” is filing lawsuits. Finally, this
8 new evidence is irrelevant and was submitted after Plaintiff filed his opposition to Defendants’
9 motion and therefore constitutes an improper newly submitted matter, which should have been
10 offered with Defendants’ original moving papers, if at all.
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12 **6. Declaration of Ronald R. Giusso, Paragraph 5:**

13 Paragraph 5 of the Declaration of Ronald R. Giusso states:

14 “I am aware that Mr. Kinder has been recently incarcerated in San Diego County
15 for an undetermined period of time.”
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17 **Grounds For Objection:**

18 This evidence should be stricken because it is without foundation and irrelevant.
19 Finally, this new evidence was submitted after Plaintiff filed his opposition to Defendants’
20 motion and therefore constitutes an improper newly submitted matter, which should have been
21 offered with Defendants’ original moving papers, if at all.
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1 **7. Exhibit 29 (“a true and correct copy of the Union-Tribune article regarding JAMES**
 2 **M. KINDER, dated February 12, 2007”):**

3 **Grounds For Objection:**

4 This document should be stricken because it is irrelevant hearsay, is without foundation
 5 and has not been authenticated. Also, this new evidence was submitted after Plaintiff filed his
 6 opposition to Defendants’ motion and therefore constitutes an improper newly submitted matter,
 7 which should have been offered with Defendants’ original moving papers, if at all. Finally, this
 8 evidence is misleading in that Judge Jan I. Goldsmith threw out the \$900,000 judgment in that
 9 case, on grounds of insufficiency of the evidence and juror misconduct.
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11 **8. Exhibit 30 (“a true and correct copy of the want-ad posted by KINDER in the San**
 12 **Diego Daily Transcript, from May 2006”):**

13 **Grounds For Objection:**

14 This document should be stricken because it is irrelevant hearsay, is without foundation
 15 and has not been authenticated. Also, this new evidence was submitted after Plaintiff filed his
 16 opposition to Defendants’ motion and therefore constitutes an improper newly submitted matter,
 17 which should have been offered with Defendants’ original moving papers, if at all.
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19 DATED: April 22, 2008

20 By: /s/ Chad Austin
 21 CHAD AUSTIN, Esq., Attorney for
 22 Plaintiff, JAMES M. KINDER
 23 Email: chadaustin@cox.net
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